IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 6, 2008 Session

IN RE KAITLIN S.

Appeal from the Juvenile Court for Morgan County
No. 124J Mike Davis, Judge

No. E2008-01465-COA-R3-PT - FILED DECEMBER 30, 2008

The trial court terminated the parental rights of Tracy S. ("Father") to his daughter, Kaitlin S. (the "Child"), who is currently 15. The trial court found, by clear and convincing evidence, that several grounds for terminating Father's parental rights exists and that termination is in the Child's best interest. Father appeals, challenging the trial court's three basic findings: (1) that DCS made reasonable efforts on his behalf; (2) that clear and convincing evidence of grounds to terminate were established; and (3) that clear and convincing evidence was presented that termination is in the Child's best interest. We modify the trial court's judgment. As modified, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

James W. Brooks, Jr., Wartburg, Tennessee, for the appellant, Tracy S.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Preston Shipp, Assistant Attorney General, General Civil Division, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I.

The petition to terminate parental rights was filed in February 2007. In the petition, DCS sought to terminate on three different grounds. First, pursuant to T.C.A. § 36-1-113(g)(1), DCS claimed that Father had abandoned the Child by failing to visit the Child and by failing to provide a suitable home for the Child. Second, pursuant to T.C.A. § 36-1-113(g)(2), DCS alleged that Father had failed to substantially comply with the statement of responsibilities contained in his permanency plan, despite reasonable efforts on the part of DCS to assist him with compliance. Third, pursuant

to T.C.A. § 36-1-113(g)(3), DCS alleged that: (1) the Child had been removed from the home for a period of at least six months by order of the court; (2) the conditions which led to the Child's removal from the home still exist and other conditions exist which in all likelihood would cause the Child to be subjected to further abuse or neglect; (3) there was little likelihood that the conditions that prevented the Child from being returned to the custody of Father would be remedied at an early date; and (4) continuation of the parent-child relationship would greatly diminish the Child's chances of early integration into a safe and stable home. Finally, DCS alleged that it was in the Child's best interest for the parental rights of Father to be terminated.[1]

The first witness at trial was the Child. She testified that she has been living with her current foster family for one and a half years. She attends high school and stated that she was doing "pretty good" in school. The Child testified that Father was currently in prison in Florida. Since going into foster care, the Child has received one Christmas card from Father and no telephone calls. The last time she saw Father was when she was six. The Child does not remember ever living with Father. The only current picture the Child has seen of Father is a "mugshot" of Father online that was posted on the Florida sex offender registry website. The Child wants to stay with her foster parents and wants them to adopt her. She stated that she would be afraid to live with Father because she does "not know him . . . and all I hear is that he is a sex offender, and I don't know who he is." On the most recent occasion the Child came into DCS custody, some three years ago, her biological mother had allegedly abandoned her. The Child stated that if she were to be adopted, she would not plan to have any contact with Father.

The foster mother also testified at trial. The foster mother explained that she had a two-story house and that the Child currently shares a bedroom with her sister.[2] The Child has been in the foster mother's care for a year and a half. Her foster mother wants to adopt her. The foster mother explained the efforts that she and DCS had made to locate Father, typically to no avail. According to the foster mother, when the Child first came under her care, she had bad grades and there were reports that she had lashed out at previous foster parents. The Child now is much better behaved; she follows the rules of the house. The Child no longer smokes or does drugs. She participates in sports and has adjusted well.

The next witness was Leonora Doyle who works for DCS. According to Doyle, the Child first came into DCS custody in September 2005 when the Child's biological mother, who had a drug problem, left the Child with an "indicated" sexual perpetrator. At that time, Father's address was unknown. Following a three-day hearing, the Child was found to be dependent and neglected. She initially was placed with a friend of the biological mother, but was back in DCS custody a few weeks later. There were several foster care reviews in 2005 and 2006. DCS continued to be unable to

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[1] As originally filed, the petition also sought to terminate Father's parental rights to the Child's older sister, Emali S. However, Emali S. turned 18 while these proceedings were pending and DCS voluntarily dismissed the petition as it pertained to her. In addition, the petition also sought to terminate the parental rights of the biological mother, Donna S., to both children. Tragically, in May 2007, the biological mother was killed in a car wreck.

[2] This person is not the Child's biological sister, but the Child and the foster mother refer to her as the Child's sister nonetheless.

locate Father. In February 2007, DCS filed a motion with the Court seeking review of the status of the Child and the necessity of continued foster care placement. By this time, Father had been located and he was at the Knox County Detention Facility. Father was sent a copy of the motion, but Doyle never heard anything from him. Thereafter, once Father was released from jail DCS undertook a computer search in an attempt to locate him. Doyle then sent various correspondence to Father's last known address. Doyle sent Father a copy of the most recent permanency plan and requested that he contact DCS. This correspondence was returned to Doyle. DCS finally located Father on the sex offender registry in Florida. Father was served with the petition to terminate while in jail in Florida. To Doyle's knowledge, Father had never visited the Child or sent her any mail. Doyle stated that Father had abandoned the Child long ago.

Doyle testified that a permanency plan was developed about a month after the Child came into DCS custody and permanency plans have been in effect ever since. The most recent plan specifically gave Father a list of activities that he needed to perform, primarily contacting DCS and entering into his own permanency plan. Doyle testified as follows:

> Q. And if someone's been in jail, a parent, and they contact you and say they want to work toward a return, what would you do about the plan at that time?
>
> A. At that time I would set up a time to either do a phone call and create a plan or set up a time to go to the local jail and develop the plan with the family member that was in jail and see what needs were necessary for the child to be placed with them upon their release.

Doyle added that she was not able to do that in this case because she did not know where Father was incarcerated. In any event, Doyle noted that at some point Father learned where the Child was staying because he sent a card to her at the foster family's house. Doyle attempted to get a return address from the envelope, but the foster parents told her "they could not provide an address from it." When asked if there was anything else she could have done to locate Father, Doyle stated:

> I'm not aware of anything I could have done. I looked, like I said, I did a Lexis Nexis search on him twice, attempted to contact who we believe to be his mother, I made contact with one of his sons in search of him and the family was aware of where he was, and [one of his other daughters] actually was the one who discovered him on the sex offender registry in Florida and [she] contacted us.

On cross-examination, Doyle reiterated the various efforts she made to locate Father. She explained that Father's permanency plan was sent to his mother's last known address, but it was returned to DCS. Doyle did not locate Father until he showed up on the sex offender registry in Florida. Doyle has never met Father.

The next witness was Karen Register, who is also employed by DCS. Register has been the case manager for the Child since June 2007. She had had no contact with Father since being

assigned to his case. Register has developed a new permanency plan and the goal of that plan is adoption. Register discussed how well the Child was doing with the current foster family, and that it would have a "huge" negative effect on the Child if she was not adopted because that is what the Child wants.

John Blair was also called as a witness. Blair is an in-home therapist who had seen the Child on a weekly basis for the past four to five months. Blair testified as follows:

> Q. And based on your conversations with [the Child], working with her weekly over the past four or five months, would you have a recommendation as to whether or not the father's rights should be terminated?
>
> A. Well, in this situation viewing it just from [the Child's] perspective, [the Child] is in need of permanency. Basically, and that need for permanency comes from an emotional need for finalization and stability because . . . [DCS] and the foster parents can say all day you're going to be at [the foster parents'] . . . but in the back of her head it's always an uncertainty [-] I could still get moved, I could still get moved . . . and this does create anxiety to her according to her in session. And as a result a termination at this time and eliminating the barriers for adoption and final permanency for [the Child] are in [the Child's] best interest in my opinion.
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> Q. And she would be a good candidate for adoption?
>
> A. Yes.
>
> Q. Have you been able to see [the Child] with her foster parents . . . [a]nd evaluate that relationship?
>
> A. Yes.
>
> Q. And how would you evaluate the bond there?
>
> A. [The Child] has profoundly bonded to her mother. She interestingly enough is even more so bound to her foster father. She has developed significant emotional ties to both as well as to their biological children.
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> * * *
>
> Q. So do you think that [the Child] has done well in foster care?
>
> A. Very well. Exceptionally so.

Blair went on to describe the relationship between the Child and Father as "absent" and added that delaying severance of Father's parental rights would negatively affect the Child.

The final witness at trial was Father.[3] Father admitted that he was in jail from April 2005 until February 2006 for failing to register as a sex offender after being convicted of statutory rape. Part of that time was spent in the Knox County jail and the remainder with the Tennessee Department of Correction in Memphis. When Father was released from jail in February 2006, he was homeless. Father was out of jail from February 2006 until he was returned to the Knox County jail in June 2006 because of a theft conviction. Father remained in the Knox County jail until the end of September 2006. Father then was released from jail and remained out of jail from October 2006 until February of 2007, at which time he was imprisoned in Florida for failing to register as a sex offender. Father admitted that there had been two four-month periods of time when he was out of jail while the Child was in foster care.

Father has a total of five children with the Child being the youngest. Father has not spoken to any of his other children for "probably about three years." Father admitted that he received a letter from his daughters that was mailed from their maternal grandparents' house and that this is how he learned where to send correspondence to the Child at her foster parents' home. Father stated that the last time he had a job was in 2004. The last time Father saw the Child was approximately eight years ago when the Child was 6. When asked why he now was interested in having a relationship with the Child after so many years, Father stated:

> Because I love [the Child], she's my daughter, and I want to have a chance for her to know who I am. When I get out of prison this time, I've been in here two years, I've got a different outlook on life and I want to know my daughter and I want her to know me.

While in jail, Father admitted that he was served with "papers" and that he wrote to DCS inquiring about how to get a lawyer. While in jail, Father sent correspondence to his attorney and his mother. Father had not sent any correspondence to the DCS case manager inquiring about the Child because he has an attorney for that. At Father's most recent job, he earned about $400 – $450 a week. He contributed none of that to the Child's upkeep. Father admitted that "I haven't really had no large effort in contacting [the Child]" and that he has "provided no financial support." The reason for this was he did not know where the Child was and the biological mother never asked for any financial support.

Following the trial, the trial court entered a final judgment terminating Father's parental rights. The final judgment provides as follows:

> [T]his cause came to be [heard] . . . upon the sworn petition of the State of Tennessee, Department of Children's Services, with all parties properly before the Court on service of process, proof

[3] Because he still was incarcerated in Florida, Father testified at trial via speaker phone.

introduced at the hearing with the appearance of the fourteen year old child . . . with her guardian ad litem . . . , the father . . . by speaker phone from prison in Florida with his counsel [present at the hearing] . . . and Leonora Doyle and Karen Register with counsel . . . as representatives of the Department of Children's Services; [the Child's] foster mother, and [the Child's] counselor . . . ; and the entire record from all of which the Court finds by clear and convincing evidence . . . .

Pursuant to T.C.A. 36-1-113(g)(1) and T.C.A. 36-1-102(1)(A)(iv), [Father] has abandoned this child . . . in that [Father] has willfully failed to visit for four (4) consecutive months preceding the filing of this petition, prior to his incarceration. In his answer, and in his testimony, he had admitted he was out of jail for a four month period of time in 2006 and 2007. He knew the child was in foster care at that time as he had received "papers" from DCS while in jail in 2005. In fact, he said he used the addresses in those papers to send letters to relatives. The court finds that the second page of the Department's permanency plan contains numerous names and addresses of extended family members.

[Father] has legally abandoned the child due to his "wanton disregard" of the child prior to his current incarceration due to his failure to register as a sex offender which he knew could result in his incarceration. This was his second incarceration for failure to register, once in Tennessee and again in Florida. The father's incarceration for failure to register as a sex offender, solely and easily within his means to do so, has created a situation where he could not provide a home for his child. . . .

[Father] has not seen the child for years prior to her placement in state custody by his own admission. He was released from jail in Knox County, and could have visited the child in Morgan County, where his adult children reside, but he did not and moved to Florida to his parents' home where he was incarcerated again.

By his own admission in his Answer filed with the court, he was incarcerated in Knox County, Tennessee from April, 2005 until February 2006; and again from June, 2006, until October, 2006. He was then confined in Florida from February 13, 2007 to present. Therefore there are two time periods of four months while the child was in foster care that he failed to make any contact. He could have visited from February 2006 to June, 2006, and from October, 2006 until February, 2007. . . . The child is now fourteen years old and does not remember ever visiting him or living with him. . . .

That grounds exist to terminate his parental rights pursuant to T.C.A. § 36-1-113(g)(3); as the child has been removed by order of this Court for a period of six (6) months; the conditions which led to her removal still persist; other conditions persist which in all probability would cause the child to be subjected to further abuse and neglect and which, therefore, prevent the child's return to the care of [Father]; there is little likelihood that these conditions will be remedied at an early date so that this child can be returned to him in the near future; the continuation of the legal parent and child relationship greatly diminishes the child's chances of early integration into a stable and permanent home.

The conditions which persist that prevent the child from a return to his custody are as follows: 1. The father was incarcerated at the time the child was placed in state custody and he continues to be incarcerated. 2. The father was found guilty of statutory rape at the time she came into foster care, and [the Child] is now the same age as that victim, and he has had no supervised visitation or family counseling or other treatment to assure the child or her guardian ad litem or the Court, that the child's safety would not be threatened by him. They have no relationship and he is a stranger to her. 3. The father has no stable home or source of income.

The statute requires that the conditions persist for six months. She has been in foster care for thirty months, far longer than the six months' length of time that the Legislature set out as a fair length of time for a parent to create a suitable home for a child.

There is little chance that those conditions will be remedied soon so that the child can be returned safely to his home. The child is already fourteen years of age and her chances of being adopted diminish as she gets older. . . .

The father's rights should be terminated for failure to comply substantially with the permanency plan, pursuant to T.C.A. 36-1-113[(g)](2) and T.C.A. 37-2-403. He admitted he received the plan while in jail in 2005. The plan required for him to contact the Department to develop a plan for him to be reunited with his child. He never sent any correspondence back to his case manager Leonora Doyle while in jail in Knox County, or later when he was released prior to his incarceration in Florida. He admitted he had sent mail to others while he was in prison, including his parents, his [other] children, his attorney . . . , and to DCS counsel, when served with the petition. . . .

After concluding that grounds had been established to terminate Father's parental rights pursuant to T.C.A. § 36-1-113(g)(1) - (g)(3), the trial court then undertook a best interest analysis. The court discussed the pertinent factors contained in T.C.A. § 36-1-113(i) and found that it had been established, clearly and convincingly, that termination of Father's parental rights is in the Child's best interest.

II.

Father appeals the trial court's final judgment. As previously noted, Father claims that: (1) DCS failed to prove that it had made reasonable efforts on his behalf; (2) the trial court erred when it found clear and convincing evidence that grounds to terminate his parental rights had been established; and (3) the trial court erred when it found clear and convincing evidence that it was in the Child's best interest for his parental rights to be terminated.

III.

In cases involving the termination of parental rights, our duty on factual matters is to "determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence." ***In re F.R.R., III***, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court's findings of fact are reviewed *de novo* upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. ***Id.***; Tenn. R. App. P. 13(d). Questions of law are reviewed *de novo* with no presumption of correctness. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor. Thus, trial courts are in a unique position to evaluate witness credibility. *See* ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999), ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987).

Parents have a fundamental right to the care, custody, and control of their children. ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); ***O'Daniel v. Messier***, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995) *rev'd on other grounds*, ***In re Swanson***, 2 S.W.3d 180 (Tenn. 1999); ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re M.J.B.***, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." ***Means v. Ashby***, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003)(quoting T.C.A. § 36-1-113(l)(l)). "Few consequences of judicial action are so grave as the severance of natural family ties." ***M.L.B. v. S.L.J.***, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting ***Santosky v. Kramer***, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See* ***Blair v. Badenhope***, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. ***In re Drinnon***, 776 S.W.2d at 97. T.C.A. § 36-1-113 (Supp. 2008) governs termination of parental rights in this state. A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interest[] of the child." T.C.A. § 36-1-113(c); ***In re F.R.R., III***, 193 S.W.3d at 530. Both of these elements must be established by clear and convincing evidence. *See* T.C.A. § 36-1-113(c)(1); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. ***In re C.W.W.***, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000), *abrogated on other grounds,* ***In re Audrey S.***, 182 S.W.3d 838 (Tenn. Ct. App. 2005).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. ***In re C.W.W.***, 37 S.W.3d at 474; ***In re M.W.A., Jr.***, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, ***State v. Demarr***, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. ***In re Valentine***, 79 S.W.3d at 546; ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); ***In re J.J.C.***, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. ***In re A.D.A.***, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); ***Ray v. Ray***, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); ***In re C.W.W.***, 37 S.W.3d at 474.

IV.

The first issue we will address is whether the trial court correctly found that DCS made reasonable efforts on Father's behalf. In the final judgment, the trial court specifically addressed this issue stating as follows:

> The Department has made reasonable efforts towards permanency for the child so that she does not remain in foster care unnecessarily, by working on dual goals at once of reunification and adoption. The Department made reasonable efforts to find [Father]. The Department sent him a copy of the permanency plan which he admitted receiving, as he said he got "papers" with addresses of all the family members, and such a list in found on page 2 of the plan. The Department conducted a computer Lexis-Nexis search. The Department wrote the paternal grandparents in Florida, with no response, although the father has testified that they knew he was incarcerated in Florida. . . .

In ***In re Giorgianna H***, 205 S.W.3d 508 (Tenn. Ct. App. 2006), this Court discussed at length the requirement that DCS exercise reasonable efforts on the parents' behalf. We stated, *inter alia*:

> The success of a parent's remedial efforts generally depends on the Department's assistance and support. *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326, at *7 (Tenn. Ct. App. Mar. 9, 2004) (No Tenn. R. App. P. 11 application filed); *State Dep't of Children's Servs. v. Demarr*, 2003 WL 21946726, at *10. Accordingly, in the absence of aggravating circumstances, the Department is statutorily required to make reasonable efforts to reunite a family after removing children from their parents' custody. Tenn. Code Ann. § 37-1-166(a)(2), (g)(2) (2005); *In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 WL 1838179, at *9 (Tenn. Ct. App. Aug. 16, 2004), *perm. app. denied* (Tenn. Nov. 8, 2004); *In re C.M.M.*, 2004 WL 438326, at * 7. Because of this obligation, the Department must not only establish each of the elements [to terminate parental rights], it must also establish by clear and convincing evidence that it made reasonable efforts to reunite the family and that these efforts were to no avail. *In re C.M.M.*, 2004 WL 438326, at *7 n.27, *8.
>
> While the Department's reunification efforts need not be "herculean," the Department must do more than simply provide the parents with a list of services and send them on their way. *In re C.M.M.*, 2004 WL 438326, at *7. The Department's employees must use their superior insight and training to assist the parents in addressing and completing the tasks identified in the permanency plan. *In re A.J.H.*, No. M2005-00174-COA-R3-PT, 2005 WL 3190324, at *9 (Tenn. Ct. App. Nov. 28, 2005) (No Tenn. R. App. P. 11 application filed) . . . .
>
> For the purpose of proceedings such as this one, the Department's reunification efforts are "reasonable" if the Department has exercised "reasonable care and diligence . . . to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1) (2005). The reasonableness of the Department's efforts depends upon the circumstances of the particular case. . . .
>
> The Department does not have the sole obligation to remedy the conditions that required the removal of children from their parents' custody. When reunification of the family is a goal, the parents share responsibility for addressing these conditions as well. Thus, parents desiring the return of their children must also make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove their children from

> their custody. *State Dep't of Children's Servs. v. B.B.M.*, 2004 WL 2607769, at *7 . . . .

In re Giorgianna H., 205 S.W.3d at 518-519 (footnotes omitted and citation omitted in part).[4]

In the present case, we agree with the trial court that DCS made reasonable efforts. DCS attempted numerous times and numerous ways to locate Father. In 2005, Father knew the Child was in DCS custody, but he did not contact DCS. He received some "papers" from DCS, but still did not contact the case manager or anyone at DCS inquiring about the Child. Locating Father was made much more difficult because for a time he was homeless and he also was in and out of jail in more than one state. Doyle testified to the various efforts she made to locate Father. DCS was able to locate Father in 2005, but his location thereafter became unknown because he did not apprise DCS of his whereabouts after being released from jail. DCS was unable to locate Father until he appeared on the Florida sex offender registry. DCS is not required to make "herculean" efforts and, short of hiring a private investigator, there was not much more DCS could do. It is important to note that Father shares in the responsibility to make a reasonable effort to be reunited with the Child. Had Father contacted DCS and made *any* effort, then more could have been done to assist him. To the extent any party is at fault for DCS not doing more on Father's behalf, it is Father, not DCS. We affirm the trial court's judgment that DCS made reasonable efforts to assist Father.

Father's parental rights were terminated pursuant to T.C.A. § 36-1-113(g)(1) - (3) (2005).[5] These statutory provisions provide as follows:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:
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> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
>
> (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4; [and]
>
> (3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

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[4] This Court in ***Georgiana*** also set forth several factors that courts often look to when determining if reasonable efforts have been made by DCS and the parent(s). We omitted these factors because they address situations, unlike the present case, where: (1) the location of the parent(s) is known and DCS is, therefore, able to at least attempt to tailor a plan to suit that parent(s) needs; and (2) the parent(s) have at least made some effort to reunite with their child(ren).

[5] T.C.A. § 36-1-113(g) has been amended effective January 1, 2009. Even though the amendment has no impact on the present case, we will, nevertheless, cite to the version of the statute in effect at the time of trial throughout this opinion.

> (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
>
> (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
>
> (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home;

The statutory provision referenced in the preceding quoted material – T.C.A. § 36-1-102 (2005) – provides, in relevant part, as follows:

> (1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> * * *
>
> (iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child. . . .

For purposes of subdivision (1) of T.C.A. § 36-1-102, "'willfully failed to visit' means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation"; and "'token visitation' means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child[.]" T.C.A. § 36-1-102(C) & (E) (2005).

The facts are undisputed that Father was in jail when the petition to terminate his parental rights was filed. Therefore, the provisions of T.C.A. § 36-1-102(1)(A)(iv) are implicated. The issue thus becomes whether Father willfully failed to visit the Child for "four (4) consecutive months

immediately preceding such parent's . . . incarceration," or whether Father "engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child. . . ." Father admitted that there was a four month period immediately preceding his incarceration where he was not in jail and did not visit the Child. Father claims, however, that this was not "willful" because he did not know where the Child was living at the time. We disagree. The reason Father may not have known where the Child was living was because he made no effort whatsoever to locate the Child, as evidenced by the fact that he had not spoken to or seen the Child for eight years. Father knew the Child was in foster care but he made absolutely no effort to contact DCS and try to locate the Child. Complete and total inaction is not the same as a lack of willfulness. We affirm the trial court's judgment that the facts establish, clearly and convincingly, that Father abandoned the Child and that grounds to terminate his parental rights pursuant to T.C.A. § 36-1-113(g)(1) had been established.

The next issue is whether the trial court erred when it found that DCS had proven, clearly and convincingly, that Father's parental rights should be terminated pursuant to T.C.A. § 36-1-113(g)(2) for his failure to substantially comply with the requirements in the permanency plan. Unfortunately, the record is altogether unclear as to exactly what "papers" were served on Father in 2005 while he was in the Knox County jail. The trial court found that he was served with the permanency plan and that is how Father located the addresses of relatives. However, Father testified that he did not receive the plan. Doyle testified twice that the permanency plan was sent to Father at his mother's last known address, but that it was returned to DCS. While we applaud the trial court's efforts to try and piece together exactly what "papers" Father was served with, due to the high standard of proof required, we, nevertheless, feel constrained to hold that the facts do not establish clearly and convincingly that Father was ever given the permanency plan. It necessarily follows that Father's parental rights cannot be terminated for his failure to substantially comply with the requirements in a permanency plan that he did not receive. The trial court's judgment is modified to delete the lower court's holding that the evidence shows, clearly and convincingly, that Father's parental rights should be terminated pursuant to T.C.A. § 36-1-113(g)(2).

We next determine whether the trial court properly found that additional grounds for terminating Father's parental rights had been proven pursuant to T.C.A. § 36-1-113(g)(3). There is no doubt that the Child has been removed from the home for at least six months pursuant to order of the court. With Father being in jail and there being no evidence that: (1) he has undergone sex offender treatment; (2) he has ever had a home suitable for raising the Child; and (3) he will become employed and be financially able to raise the Child, there is a significant likelihood of continued neglect which prevents the Child from safely being returned to his care. There was no proof offered at trial suggesting that the conditions subjecting the Child to potential further neglect could or would be remedied by Father at an early date, thereby allowing the Child's return to his care in the near future. The Child has been in foster care since 2005. She currently is in a very good foster home and the foster parents are desirous of adopting her. Continuation of the parent/child relationship would greatly diminish, if not eliminate, the Child's chances for integration into a stable and safe home environment. We affirm the trial court finding that grounds had been proven clearly and convincingly pursuant to T.C.A. § 36-1-113(g)(3).

The final issue is whether the trial court erred when it concluded that DCS had proven, clearly and convincingly, that it is in the Child's best interest for Father's parental rights to be

terminated. The relevant statutory provision is T.C.A. § 36-1-113(i) (2005), which provides as follows:

> (i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

T.C.A. § 36-1-113(i). When considering the child's best interest, the court must take the child's, rather than the parent's, perspective. ***White v. Moody***, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

The facts clearly establish that Father has not made an adjustment of circumstance such that it would be safe for the Child to return to his care. The facts actually show that he has made no adjustment at all. Father has not maintained contact with the Child for many years and there is no meaningful relationship whatsoever between Father and the Child. Father has never paid child support or provided any financial support to the Child over the years. Evidence was presented that a change in caretakers at this point would have a significant negative effect on the Child. Given that Father has been convicted of statutory rape and the Child currently is the same age as Father's victim, without Father successfully undergoing sex offender treatment, the potential home environment should Father regain custody cannot be described as safe. In its final judgment, the trial court carefully considered all of the pertinent factors contained in T.C.A. § 36-1-113(i) when it concluded that it had been established by clear and convincing evidence that termination of Father's parental rights is in the Child's best interest. That finding is affirmed.

V.

The judgment of the trial court is modified to delete the court's reference to a T.C.A. § 36-1-113(g)(2) basis for terminating Father's parental rights. The remainder of the trial court's judgment is affirmed. Costs on appeal are taxed to the appellant, Tracy S., and his surety, if any, for which execution may issue. This case is remanded to the trial court for enforcement of the court's judgment and for the collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE